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No. 88-1921

In The

Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually, and in his official capacity, and THE TOWN OF LAKE PARK, FLORIDA

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

Frank Morgan, at all times material hereto, was a resident of the Town of Lake Park. Mr. Morgan actively participated in the Town's political process by soliciting and actively supporting the candidacy of several persons. Mr. Morgan also held a seat on one of the Town's appointed boards. In January, 1985, Morgan began to write for *Weekday*, a local weekly newspaper.

Whitt was the Town Manager of the Town of Lake Park, and as such, was appointed by the Town Commission. In that capacity, Whitt was the chief executive officer overall in charge of personnel.

In late 1984, a police dispatcher came under investigation. This dispatcher averred that she possessed a high school diploma when, in fact, she did not have same. Apparently, the investigation at the time she was hired was not properly conducted. As a result of the investigation performed by Whitt and Sgt. Tice, civil service charges and a charge of perjury were brought against said dispatcher. (R5/49)

In January, 1985, Morgan began to write for *Weekday*. Some of the articles were critical of Whitt. In late January, 1985, Whitt and Sgt. James Tice travelled to the State of New York for the purpose of investigating the qualifications of the dispatcher. The flight arrangements made included a scheduled stopover in Philadelphia, and during this stopover, Whitt visited Morgan's former place of residence.

The above overview is more fully discussed below. The pertinent facts are discussed more fully in topical fashion below.

Morgan's Political Activities

Morgan had been actively involved in Town politics and had solicited persons to run for town office. Morgan was active in publicly supporting the campaign of Max Mickley. (R5/336) Morgan also solicited Lenny Cottrell to run for Town Commission. (R5/138, R6/320) Later, Cottrell was advised by Morgan that he could no longer support Cottrell because Cottrell did not vote to fire Whitt. (R6/348)

Morgan approached Gil Watts to run for Town Commission. (R5/138, R6/347) Morgan accompanied Watts to Town Hall to qualify for election. It was on this visit that they met Whitt and at this time, which was Watts' first encounter with Whitt, that Morgan told Whitt to meet the man who was going to fire him. (R5/348)

Morgan continued to be involved in tc . politics. At one point, Morgan, in discussing the furniture purchase, inferred that Whitt received kickbacks from the furniture vendor. This statement was made in the presence of Pastor John Miller, Gil Watts and Lenny Cottrell. (R6/317, 321) Later, Morgan denied this and claimed that he, in fact, displayed a report exonerating Whitt.

Morgan's Articles

Morgan began to write for *Weekday* in January, 1985, and continued until April 3, 1985. (R5/139) He later wrote at least one article in March or April of 1986. (R6/454) Morgan's articles criticized Whitt's performance and were written in the form of a column.

Morgan wrote in one article that Whitt had violated his oath of office and was allowing a member of the Town's Commission to violate a municipal ordinance. (R5/143) In essence, the Town Commissioner had declined to take a salary which Morgan felt, under the Town's Charter, was mandatory. The Town Commissioner did elect not to receive a salary.

In a second article, Morgan wrote that Whitt's actions rekindled memories of the 1930's when Hitler was coming to power with the Nazi party. (R5/145, 146).

The Trip

Whitt and Sgt. James Tice travelled from West Palm Beach, Florida to Auburn, New York. Whitt was going to investigate the background check which had been performed on the dispatcher, and Tice was to verify that the employee did not have a high school diploma. (R5/49, 51, 93, R6/444) When making flight arrangements, Whitt found that there was not a direct, non-stop flight to Syracuse, the closest city to Auburn, and found that a flight connected through Philadelphia. (R5/47, 180) Whitt decided to utilize the stopover in Philadelphia to review Morgan's background and respond to Morgan's allegations. (R5/47, R6/180)

Tice received compensatory time, not straight pay, for the Pennsylvania portion of the trip. Whitt charged all expenses related to the trip, but only sought reimbursement for the air fare and the Syracuse automobile rental. The other expenses relating to the Pennsylvania portion of the trip were paid for by Whitt. (R5/70, 114) A fare

increase of $179.00 was incurred due to the stopover, but Whitt was unaware of this additional cost. (R6/177)

Tice accompanied Whitt on the trip to Pennsylvania but did not have any official duty in Pennsylvania. (R5/113, 120, 123, R6/195)

The first stop in Pennsylvania was a small diner located in Schwenksville. (R5/104) There, Whitt and Tice encountered two young men. Whitt asked if they knew Morgan, and one of the young men called Morgan a crook. (R5/104)

Whitt and Tice then travelled to the *Collegeville Independent*, a local newspaper. Prior to entering, Whitt told Tice to show his identification because people would show them more if he identified himself. (R5/103) At the *Collegeville Independent*, Whitt asked to see the archives regarding Morgan. (R5/61, 106) He was told that no one present could authorize the review.

While at the *Collegeville Independent*, they spoke to Lynn Nice. She stated that Whitt told her that Morgan had been involved in a land deal that could be lucrative to him and that some properties had mysteriously burned. (R6/210) Nice testified that she felt that Morgan was a person that she did not want to know. (R6/210) J. Howard Fenstermacher was also present but did not recall the discussion. (R6/246)

Whitt had contacted the Police Chief[1] and Mayor of Schwenksville to arrange an appointment with them.

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[1] Whitt proferred testimony to the trial court of Frances Kuhn, Police Chief, wherein Mr. Kuhn testified that mysterious fires were investigated as arson. The court below ruled said testimony inadmissible.

Whitt and Tice went to Schwenksville Town Hall and met with several persons and received copies of *Schwenskville Item*, a local paper. Minutes of various meetings were likewise made available to Whitt and Tice. (R6/287, 289, 275, 295) Some of those present felt that Whitt was investigating Morgan, but did not perceive it as a criminal investigation. (R6/276, 283, 289, 295). Whitt stated that he was there in his personal capacity. (R/282). Interestingly, only Nice had a dislike for Morgan because of the meetings. Those who knew Morgan said Morgan's reputation were not affected.

Post Trip Activities

Following the return of Whitt and Tice from the trip, Morgan learned of the trip by way of a telephone call from his friend, John Stuart, the owner of the *Collegeville Independent*. Morgan wrote an article shortly after Whitt's return asking that Whitt disclose whatever he learned about Morgan at the next council meeting. Whitt published two articles in the format of letters to the editor, which included his opinions and republished some items which were given to him by the editor of the *Schwenksville Item*.

Most notably, Morgan continued to write for *Weekday* until April 3, 1985. (R5/139) In March, 1985, Morgan asked Betty Bache to run for Town Commission. Mrs. Bache declined. In August, 1985, Morgan again asked Mrs. Bache to run for Town Commission and this time she accepted, and received Morgan's active support. (R6/38) Morgan assisted Bache in her campaign by arranging for signs, suggesting wording for flyers, and

assisting with the collection of campaign funds. Mrs. Bache rejected some of the wording that Morgan proposed for her brochure as they referred to police state tactics. (R6/330) Morgan told Bache that he wanted Whitt fired. (R6/330)

Morgan continued to be involved in politics and in the spring of the following year, Morgan supported his own daughter's candidacy over Betty Bache, using the same signs he had given to Bache the previous year. (R6/330, 332)

During 1985, Morgan also supported the candidacy of Martha Guard for Town Commission and Mayor. (R6/339) Morgan provided Guard with signage and advice, and hosted candidate meetings in his own home. (R6/340, 341) Again, Guard was elected and after failing to fire Whitt at Morgan's request, Morgan supported Guard's opposition the following election. (R6/341, 342) Morgan later wrote at least one article in April, 1986 for *Weekday*. Morgan claimed that as a result of Whitt's actions, he was frightened, lost sleep and was afraid that he might be killed or his home bombed.

Proceedings Below

Morgan sued Whitt under theories of defamation, invasion of privacy and violation of 42 U.S.C. Section 1983. Morgan also brought an action against the Town of Lake Park. At the trial below, the trial court ruled as a matter of law that Morgan was a public figure. (R7/596). The matter went on to jury trial and the jury awarded Morgan $37,500 as compensatory damage against both defendants on the violation of 42 U.S.C. Section 1983,

$1,000 against Whitt for defamation/invasion of privacy, and $9,000 in punitive damages.

Motions for a new trial and judgment n.o.v. were denied. An appeal was taken to the Eleventh Circuit Court of Appeal. The Eleventh Circuit Court of Appeal reversed, holding that Morgan had failed to show that Whitt's actions were under color of state law; that there was no showing of falsity and no showing of actual malice, as required.

It is noted that the trial court found Morgan to be a public figure and instructed the jury in that regard. (R5/596) The petitioner did not challenge this finding at the Circuit Court below. The finding of the trial court was based, in part, upon Morgan's active and vocal involvement in town politics, and service on at least one town board.

SUMMARY OF ARGUMENT

THE COURT SHOULD NOT GRANT PETITION FOR CERTIORARI FOR REASONS MORE FULLY OUTLINED BELOW

There is no conflict between the Eleventh Circuit ruling below and other applicable Section 1983 decisions rendered by this court or other federal courts. In this instance Whitt did not act as an official, the actions of Whitt were taken well beyond geographical limits of his authority, could not be considered as misuse of his authority, did not purport to be taken in his official capacity, and Whitt did not receive any special consideration.

The Eleventh Circuit review of the case below was proper, and after review of the record found that Morgan, a public figure, did not show clear, convincing evidence that Whitt made false and defamatory allegations with actual malice. The court below found that there had been no showing that the comments made by Whitt were false.

ARGUMENT

POINT ONE

THE DECISION OF THE ELEVENTH CIRCUIT THAT WHITT'S ACTIONS WERE NOT TAKEN UNDER COLOR OF STATE LAW WAS PROPER AND IN CONCERT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

The court below properly ruled that Whitt was not acting under color of state law and thus was not subject to liability under §1983. The court below did not come in conflict with this Court's rulings or the rulings of other circuit courts of appeal by virtue of its reversal of the judgment of the trial court.

Title 42 U.S.C. §1983 is an appropriate basis for relief where one person has deprived another of rights or interests secured by the Constitution or laws of the United States and where such actions were taken under color of state law, state statute, ordinance, custom or usage. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The action or conduct which causes the deprivation of a protected right must be fairly attributable to the state. This requires a two part inquiry. First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a person for whom the state is responsible.

Secondly, the persons responsible or charged with the deprivation must be a person who may fairly be said to be a state actor. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The elements of this inquiry seem to merge when the alleged actor is an official of the state.

Admittedly, actions under Section 1983 have been held to lie where an official abuses the authority which he possesses by virtue of an elected or appointed position. *Brown v. Miller*, 631 F.2d 408 (Cir. 5, 1980). However, this case does not fall within the scope of such abuse.

Likewise, an action which is taken by an official not in the scope of his authority will not result in liability simply because the actor is possessed of a government title. *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981). This approach is applicable to the case at bar.

In the case at bar we find that Whitt was travelling with Sgt. Tice to upstate New York to conduct an investigation of a city employee. When Whitt learned that the plane would have a stopover in Philadelphia, it was then that he decided to undertake a private side trip. On this side trip, Tice, who accompanied Whitt, took compensatory time and repeatedly indicated that he was not on official business. (R6/113,120,123). Whitt paid for the costs incurred in this side trip, including hotel rooms, rental car and meals. Whitt submitted a request for compensatory time for the duration of this Pennsylvania portion of this trip. Whitt visited two newspapers and had discussions with public officials and sought items of public record or items which had been published by one of the two newspapers he visited. At no time did Whitt

employ any official requests from his office or the office of the chief of police for the material in question.

When reviewing the public archives, Whitt advised that he was there in his personal capacity. The material was not secured by way of any search warrant, request made by the public agency, nor by any computer based inquiry system such as the National Crime Information System. In fact, the information which Whitt obtained was nothing more than what an interested citizen could have received. Whitt received no consideration due to his position, nor did he at any time attempt to exercise or purport to exercise any authority of his position or the position of the Town of Lake Park Police Chief. It is clear that Whitt did not have any authority within the State of Pennsylvania, and for that matter, neither did Sgt. Tice.

The information which Whitt received was used in articles which were published in a local Lake Park newspaper. In fact, Whitt's articles were published in the same newspaper which had published Morgan's. Certainly, Mr. Whitt is entitled to utilize his own rights of free speech to respond to the vicious criticisms directed against him. Whitt did not utilize any authority that he possessed, but rather exercised his rights and liberties given to him by the United States Constitution.

Morgan urges this Court to grant his petition, indicating a much lower level of state action is required. Toward that end, the petitioner cites *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (en banc). In *Nishiyama*, the sheriff and his deputy allowed a "trusty" to have use of a patrol car for the purpose of running their business and personal errands. During the course of

one of these "errands", the trustee utilized the flashing lights of the patrol car to pull over the young victim. The Sixth Circuit noted in its opinion that representatives of the sheriff's department had received complaints from others that one of their cars was making unauthorized traffic stops. Clearly, the inmate had been granted authority to utilize the car and it was the misuse of this authority which lead to the Sixth Circuit Court of Appeal finding that a cause of action had been stated.

The common thread running through all of the cases cited by petitioner is that there had been a misuse of authority. The authority, however, was misused within the jurisdiction of the actor. For example, in *Layne v. Sampley*, 627 F.2d 12 (6 Cir. 1980), the plaintiff was shot by a police officer who while off duty was carrying a gun under specific grant of authority and pursuant to state statute. In *Lusby v. TG&Y Stores, Inc.*, 749 F.2d 1423 (10 Cir. 1984), an off duty police officer working within his own jurisdiction identified himself as a municipal police officer and arrested the plaintiff below. During the course of an ensuing struggle, the off duty police officer apparently struck one of the plaintiffs with a pistol. In *Lusby* it is clear that the officer intended and purported to act as a police official within his jurisdiction, a substantially different situation than we have presently.

In *Davis v. Murphy*, 559 F.2d 559, 1098 (7th Cir. 1977), two off duty City of Milwaukee police officers and an off duty firefighter became involved in a dispute with racial overtones which resulted in the police officers' identifying themselves, displaying their badges and ultimately drawing their weapons. The plaintiffs were arrested and taken to jail. The police officers were carrying their

badges and guns and were on duty pursuant to a specific departmental regulation.

In *Howard Gault v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1980) there was an interlocking relationship between certain government attorneys and the Vegetable Growers Association. The Growers acted in concert with and through their attorneys who were public officials. These public officials utilized certain resources which would not have been available to other parties who had hired purely private attorneys. Similar cooperation resulted in finding of action under color of state law in *Dennis v. Sparks*, 449 U.S. 24 (1980).

Other cases have found that presence of a police officer or use of the police officer's badge gives rise to actions under color of state law; however, in each and every one of those instances, the police officer appeared, either wearing a uniform or flashing his badge, and identifying himself as a police officer and took certain actions within his own jurisdiction. See, e.g., *Lusby v. TG&Y*, supra; *Booker v. Atlanta*, 776 F.2d 274 (11th Cir. 1985).

In the case at bar, Whitt did nothing more than what a normal citizen, or for that matter, what a reporter could have done in a similar situation. He did not go to Pennsylvania clothed in any cachet authority, nor did he purport to be clothed in any authority. In fact, there is testimony that Whitt and Tice both told individuals that they were not on official business. The expenses of the trip were paid by Whitt. Tice and Whitt both received compensatory time, not straight pay, for their time which encompassed the portion of their 'side trip'.

Certainly, the First Amendment to the United States Constitution also gives certain rights to Dennis Whitt. He should be able to confront and respond to the allegations of his critics. In doing so in this case, Whitt did nothing more than rely upon public records and speak to people who were in the public domain. It is also noted that Frank Morgan was a publicly known figure, both in Florida and in the Schwenksville, Pennsylvania area. Whitt did not receive any material which was privileged, confidential or beyond the normal range of public scrutiny.

It is clear that the opinion of the Eleventh Circuit applied the appropriate prevailing law and its opinion is not in conflict with the opinions of this Court or the other circuits. For this reason, the petition for writ of certiorari should be denied.

POINT TWO

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEAL IS NOT IN CONFLICT WITH THE DECISIONS OF ANY FEDERAL APPELLATE COURTS, NOR DOES IT CONFLICT WITH THE FIRST OR SEVENTH AMENDMENT

Morgan was deemed by the court below to be a public figure. The record is clear that Mr. Morgan was not only a public figure in Lake Park, Florida, but had likewise been a public figure in Pennsylvania where he held elected office and had been actively involved in politics. It is clear that a public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false statement was made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964);

Harte-Hanks Communications, Inc. v. Connaughton, U.S. Supreme Court 88-10, June 22, 1989.

Further, the review by the Eleventh Circuit satisfies the guidelines set forth in *Harte-Hanks Communications, Inc. v. Connaughton*, supra. The Eleventh Circuit found "[t]he plaintiff made no effort to show that the comments made by Whitt were false". *Morgan v. Tice*, 862 F.2d 1495 at 1500.

This Court recently ruled that a reviewing court should conduct an independent review of the record to determine whether or not the requisite elements were proven. *Harte-Hanks Communications, Inc. v. Connaughton*, supra. The court below satisfied this approach. The court below reviewed the record and found that there was no proof regarding falsity of comments that were allegedly made, and thus the key element of actual malice was unsatisfied.

In *Bose Corporation v. Consumers Union of United States, Inc.*, 456 U.S. 45 (1984), this Court held that the record must be reviewed to determine whether or not evidence of actual malice exists and is supported by clear and convincing proof. Malice, which is necessary, goes beyond simple ill will. As aptly pointed out in *Bartimo v. Horsemen's Benevolent and Protective Association*, 771 F.2d 894 (5th Cir. 1985), there is a distinction between the ordinary understanding of malice and sense of ill will and the actual malice that is required under the *New York Times v. Sullivan, supra* decision. The Eleventh Circuit properly made this distinction. It is not enough to say that Whitt desired to find unsavory things regarding

Morgan's past. It must be shown that Whitt made statements which were known to be false or made with reckless disregard for falsity. Proof of this key element was totally lacking in plaintiff's claim.

Morgan, in his petition, claims that Whitt made numerous accusations that Morgan had been involved in arson. This simply is not the case. A close review of the record shows that comments made dealt with the fact that some properties owned by Morgan had mysteriously burned. Whitt did not say that Morgan had committed arson[2]. Further, in comments on Whitt's behalf indicating that he would like to lock up Morgan, simply do not satisfy the type of malice needed where the plaintiff is a public figure.

In reviewing the record it is clear that Morgan did not satisfy the requisite burden of proof at the trial court level and thus the decision of the Eleventh Circuit, which found no indication of falsity, was correct under the guidelines established in *Harte-Hanks Communications, Inc. v. Connaughton,* supra.

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[2] Respondent points out to this court that there were several issues on appeal which were not reached by the Eleventh Circuit in their opinion. The Eleventh Circuit opinion rendered moot four of the arguments set forth by Whitt. Argument number six below dealt with exclusion of certain testimony of Francis Kuhn. Kuhn was Chief of Police of Schwenksville. The court below excluded testimony regarding the manner and method in which certain fire investigations were conducted in the State of Pennsylvania. It is clear that Whitt called Kuhn prior to the trip to Pennsylvania and the excluded testimony of Kuhn would have provided an explanation regarding Whitt's source of information.

Alternatively, petitioner argues that a different standard should be utilized in the case at bar. The petitioner claims throughout their petition that Morgan was nothing more than a citizen critic. This is clearly erroneous as Morgan was found by the trial court to be a public figure and had been actively involved in politics in the Town of Lake Park. Morgan was not simply a citizen critic, he was a political participant who solicited and ran persons for office, belonged to appointed boards and was very actively and vocally involved in politics. Moreover, the articles Morgan wrote about Mr. Whitt included analogies to Hitler's rise in Nazi Germany certainly go beyond the pale of a typical citizen critic. Mr. Morgan chose to be a public figure in the Town of Lake Park as he had chosen to be a public figure in the town of Schwenksville. This Court's denial of the petition will not signal a change in the scope of protection of the First Amendment. This Court's denial of the petition will simply allow the Eleventh Circuit's opinion, finding no showing of actual malice, to stand.

Moreover, this case does not draw a clear distinction between a citizen critic and a person who acts solely in his role as public official. In this case, Mr. Whitt exercised his right guaranteed by the First Amendment of free speech. He sought information on Mr. Morgan, information which was a matter of public record and *published* it in the same weekly newspaper in which Morgan had published his article.

The court below properly applied the guidelines which this Court has recently set forth in reviewing the case below. The court below found that the petitioner had not proven a case of actual malice nor did he make any

effort to show that the comments made by Whitt were in fact false. In essence, the actions of the Eleventh Circuit were in concert with the opinions of this Court and the petition for writ of certiorari should be denied.

POINT THREE

THE DECISION BELOW IS IN CONCERT WITH THIS COURT'S TITLE 42, SECTION 1983 POLICY CASES

The Eleventh Circuit below properly found that Whitt's actions did not amount to an execution of the Town of Lake Park's policy or custom. While Whitt may have been an executive of the Town, Whitt certainly did not set policy. Furthermore, Whitt's actions were, at most, an exercise of his own First Amendment right to respond to certain villifying articles written about him. Whitt did so in his own personal role and was not in any way promoting a policy of the Town of Lake Park.

This Court, in *Pembaur v. City of Cincinnati*, 475 U.S 469 (1986) establishes that official policy is a requirement for the attaching of liability to a municipality. It cannot be said that Whitt was acting in his official capacity nor can it be said that municipal policy was being executed or in any way carried out by Whitt's actions. The decision of the court below is not contrary to this Court's Section 1983 policy jurisprudence.

CONCLUSION

There is no conflict between the Eleventh Circuit ruling below and other applicable Section 1983 decisions rendered by this court or other federal courts. In this instance Whitt did not act as an official, the actions of Whitt were taken well beyond geographical limits of his authority, could not be considered as misuse of his authority, did not purport to be taken in his official capacity, and Whitt did not receive any special consideration.

The Eleventh Circuit review of the case below was proper, and after review of the record found that Morgan, a public figure, did not show clear, convincing evidence that Whitt made false and defamatory allegations with actual malice. The court below found that there had been no showing that the comments made by Whitt were false.

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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